

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	

**COMMENTS OF THE
NEBRASKA PUBLIC SERVICE COMMISSION**

The Nebraska Public Service Commission (NPSC) respectfully submits these Comments in response to the Federal Communications Commission's (FCC or Commission) March 10, 2004 Notice of Proposed Rulemaking in the above-captioned docket (*NPRM*). In the *NPRM*, the Commission sought comment on issues pertaining to the appropriate legal and regulatory framework for IP-Enabled Services. While the Commission's *NPRM* contained a comprehensive list of issues for interested parties to address, the NPSC will address only those issues it believes are the most critical at this time.

INTRODUCTION

As the Commission is well aware, IP-enabled services take many forms such as computer-to-computer, phone-to-phone, computer-to-phone and phone-to-computer. However, despite the technology used, many of the IP-Enabled services have the same function, to provide voice communication service.¹ As the Commission has previously indicated through its findings in the Pulver.com FWD petition² and the AT&T petition³, a

¹ The NPSC is particularly concerned with the regulatory treatment given to Voice Over the Internet Protocol (VOIP) service providers.

² *In the Matter of the Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order (February 19, 2004).

“one-size-fits-all” approach may be unworkable. Likewise, the NPSC believes characterizing IP-enabled services by **technology** and using that as the touchstone for determining whether they should be “information services” or “telecommunications services”⁴ may create unprecedented confusion for consumers, the industry and regulators alike. The NPSC recommends that the FCC primarily look to the **functionality**⁵ of the IP-enabled service and the expectations of consumers when considering how to classify or whether to exempt certain IP-enabled services. When weighing the issue of state regulatory authority, the NPSC recommends that the Commission give heavy consideration to the expectations of the end-user. In that regard, the NPSC believes state commissions offer consumers a close and present forum to voice grievances, seek remedies, and obtain expert opinions on public services offered within the state. Inasmuch as where an IP-enabled service provider is holding itself out to the public as a provider of voice communication service, it should be subject to some state consumer protection regulation and oversight. Because of the close proximity to the end-user, state commissions are in a suitable position to determine whether or not an IP-Enabled service is being offered as a replacement service for POTS. The NPSC urges against a Commission finding that one or more classes of IP enabled services is subject to *exclusive* federal jurisdiction.⁶ Rather, the NPSC recommends that the state-federal partnership envisioned by the 1996 Act continue. IP-

³ *In the Matter of the Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order (April 21, 2004).

⁴ Defined in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) at 47 U.S.C. § 153 (20)(43)(44) and (46)(“1996 Act”).

⁵ The NPSC believes the functional equivalent approach recommended in these comments is philosophically consistent with the Commission’s approach in its 1998 Report to Congress. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, (April 10, 1998). Although the NPSC is proposing that, if the current regulatory framework is used, the Commission modify its list of factors used to determine whether the service is functionally equivalent to a telecommunications service.

⁶ See *NPRM* para. 41.

Enabled service providers should contribute equitably to established universal service mechanisms and, where connecting to the PSTN, should contribute to the intercarrier compensation regime.

CURRENT NPSC REGULATORY FRAMEWORK

The NPSC is a constitutionally created agency with inherent and statutorily created authority to regulate telecommunications carriers. A telecommunications carrier is defined as a person or company offering telecommunications services for a fee. Neb. Rev. Stat. § 86-121 (2002 Cum. Supp.). Telecommunications is the “transmission, between or among points specified by the subscriber, of information of the subscriber’s choosing, without a change in form or content of the information sent or received. § 86-117. All wire-based⁷ telephone companies are required by state law to apply for a certificate of public convenience and necessity, file a rate list and to provide adequate service to its customers. See Neb. Admin. Code Title 291, Chapter 5. All telecommunications companies, regardless of technology used, are required to comply with applicable 911/E911 and state universal service regulations. Obtaining a certificate of public convenience and necessity has not shown to be particularly burdensome on new entrants as the NPSC has removed barriers to entry to foster competition consistent with the 1996 Act. To obtain a certificate, telecommunications carriers are required to show technical, managerial and financial fitness to operate the proposed service and demonstrate that a grant of a certificate would serve the public

⁷ Wireless carriers are required to register with the Commission. Neb. Rev. Stat. § 86-124 (2002 Cum. Supp.). Wireless carriers are required to give the Commission contact information for the state’s administration of the Nebraska Universal Service Fund, Wireless Enhancement Fund and so that the NPSC can pass along subscriber complaints and inquiries to the appropriate person.

interest. Most applications are processed without a hearing and are ruled upon in less than 60 days.

Rates charged by carriers have generally been deregulated in Nebraska.⁸ Companies are required to file rate lists with the Commission, which, in most cases, automatically go into effect after ten days notice unless suspended or rejected by the Commission. The NPSC's universal service mechanism serves as an incentive for carriers to keep rates affordable and reasonably comparable.

Telephone companies are required to bill, collect and remit surcharges to the state universal service fund, the telecommunications relay fund and the 911 programs, are responsible for maintaining adequate service levels, are required to file an annual report on Commission-prescribed forms, and are subject to consumer protection standards relating to notice for disconnection and deposits and anti-slamming and cramming rules. The NPSC's established regulations and programs each serve a purpose and have been determined necessary either by the legislature or by the NPSC to protect public interest.

Generally speaking, the NPSC's rules and regulations are not heavy-handed or burdensome. As the NPSC recently noted in its service quality proceeding, it intends to consider which rules should be inapplicable when operating in a competitive environment. Comparatively speaking, most of the NPSC's rules, particularly in terms of service quality, slamming/cramming, billing and disconnection, do not vary significantly with those applied by most other state commissions.

Since the Act's passage, where possible, the NPSC has been working to tailor its rules to address the function of the service and not the technology by which service is

⁸ See generally Neb. Rev. Stat. §§ 86-139 to 86-156 (2002 Cum. Supp.).

delivered. It is not the NPSC's intention to subject IP-Enabled service providers to regulations not currently imposed on other carriers.

CATEGORIZING IP-ENABLED SERVICES

The NPSC respectfully submits that the current regulatory classification framework may be untenable in this environment. Some IP-Enabled services are arguably "combination services" with characteristics of both telecommunications and information services as defined by the Commission and the 1996 Act. Classifying services on the basis of the technology used to provide them, in the NPSC's opinion would create an environment of never-ending rule amendments, declaratory actions and legal battles. The Commission would be in the position of playing "catch-up" to account for the ever-changing technology. Because it is impractical to tailor regulations to address technologically specific factors, the NPSC believes that the Commission should place greater import on the functionality of the service rather than the technology used to provide the service. Broadly classifying IP-enabled services as information services or Title I services, when they also have a telecommunications component or function distorts market activity and is not equitably accounting for the resources being used. This is particularly true when a service touches the PSTN. Moreover, basing the regulatory scheme on functionality rather than technology will also preserve and advance principles of competitive neutrality.

However, if the Commission finds it appropriate to categorize IP-Enabled services using the present regulatory framework, the NPSC recommends that the Commission use the following factors as determinative:

1. Whether the IP-Enabled service is functionally equivalent to traditional telephony.
2. Whether the IP-Enabled service provider advertises or represents its service as telephone service or a replacement service for POTS.
3. Whether the subscriber can or does utilize the IP-Enabled service as a replacement for traditional local exchange service or POTS.
4. Whether the IP-Enabled service provider utilizes traditional NANPA-administered telephone numbers.
5. Whether the IP-Enabled service provider utilizes the PSTN in either originating or terminating service.

The NPSC believes that if one or more of these characteristics are present, such service, or a portion thereof, should be classified as a “telecommunications” service. The presence of factors 1-4 above give rise to consumer expectations that the service they are using will offer similar protections as compared to traditional local exchange service including the ability to seek a remedy from state or local government agencies. Similarly, the NPSC believes that using factor 5 is necessary to evaluate the manner in which resources are being used by IP-Enabled service providers in competition with other telephone service providers.

Irrespective of how the Commission classifies them, the NPSC believes that if the Commission preempts or limits state authority over IP-Enabled service providers on the basis of technology used to provide that service, such action may have a devastating effect on consumers and existing carriers. By virtue of that decision, the Commission would be choosing a favored technology, altering market forces, and creating an unlevel playing field.

STATE ROLE

Congress envisioned a federal-state partnership to carry out the goals of the 1996 Act. Without question, the Act gives the Commission certain preemption authority particularly when state or local law operates to hinder competition. 47 U.S.C. § 253(d). However, Congress equally intended to preserve the states' ability to advance universal service objectives, and to protect local interests, safety and welfare of its citizens. 47 U.S.C. § 253(b). Like the Commission, the NPSC has an interest in promoting and advancing new technologies and services and believes that IP-Enabled service providers should not be strapped with undue regulatory burdens. However, the NPSC would recommend that the Commission and states work together to create an environment which neither favors a particular provider nor places upon it any undue burdens which would slow competitive entry.

UNIVERSAL SERVICE

Should the Commission declare IP-Enabled services largely exempt from state contribution requirements, the effect of such treatment will hinder the ability of the regulated telecommunications carriers to provide service at affordable and reasonably comparable rates. The NPSC hopes that the Commission will be careful not to erode meticulously developed and balanced state universal service mechanisms and policies. Plainly stated, the NPSC believes that all IP-Enabled service providers within the state should be required to contribute equitably to the state universal service mechanism.

In 1997, the Nebraska Legislature enacted the Nebraska Telecommunications Universal Service Fund Act directing the NPSC to create a universal service mechanism to ensure that all its citizens have affordable and comparable access to

telecommunications and information services. To that end, the NPSC has taken painstaking efforts to establish a mechanism where all telecommunications and information carriers (where possible taking into consideration the interstate/intrastate distinction), including wireless carriers and paging carriers, contribute equitably through a surcharge which they pass on to their customers. The surcharge is based upon intrastate retail revenues of the carriers. Through the years, the NPSC has brought all local exchange carriers to a benchmark residential and business rate, required carriers to reduce access rates and replaced such implicit subsidies in rates with explicit universal service support. If the base for high cost and lifeline support is eroded by service providers having a significant advantage over, yet acting in competition with, existing exchange carriers, the result could be the failure to meet universal service objectives promised to consumers by state and federal law.

ACCESS TO EMERGENCY SERVICES

The Commission must permit states to continue their efforts to coordinate and develop emergency access and response programs. The 1996 Act and the Wireless Communications and Public Safety Act of 1999 specifically confer to the states the ability to protect the public safety and welfare of its citizens.⁹ This is true regardless of the facilities used to access the PSAP. The NPSC has a vested interest in providing its citizens with predictable and accurate access to emergency services.

⁹ Pub. L. No. 106-81 113 Stat. 12896 (codified at 47 U.S.C. §§ 251(e) and 615).

CONSUMER PROTECTION

The Commission must permit states to protect its consumers from deceptive and unfair business practices. In some states, a regulatory body is the primary or exclusive avenue for consumers to take their grievances, complaints and inquiries concerning the practices of a utility. In Nebraska, the NPSC provides a cost-effective public service, which assists consumers with billing disputes, unfair business practices and service problems. In the majority of cases, it would not be practical for consumers to file an action in court to resolve a billing problem.

One consumer protection measure that is of significant import for the NPSC and Nebraska citizens alike is anti-slamming and cramming rules. The Commission should permit states to continue to enforce such laws, rules, and regulations to protect customers from cramming and slamming violations in an IP environment.

INTERCARRIER COMPENSATION

The NPSC concurs with the tentative conclusion of the Commission in paragraph 33 of the *NPRM*. Any service provider sending traffic to the PSTN should be subject to compensation obligations regardless of where it originates. The NPSC agrees that costs should be spread equitably among those who use the PSTN.

CONCLUSION

The Commission should establish a new regulatory framework which focuses on the functionality of the service being offered. If the Commission chooses to use the existing framework, it should use the factors described above as determinative. The Commission should not preempt states' ability to require IP-Enabled service providers

to contribute to state universal service and 911 funding mechanisms, or truncate the ability of states to impose certain minimal consumer protection regulations where necessary.

Respectfully Submitted,

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